STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL EDWARD JOHNS,

Defendant-Appellant.

UNPUBLISHED
July 15, 1997

No. 186883
Muskegon Circuit Court
LC No. 94-37041-FC

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant Carl Edward Johns was convicted of two counts of first-degree felony murder (larceny), MCL 750.316(1)(b); MSA 28.548(1)(b). He was sentenced to a prison term of natural life with no parole. He appeals as of right. We affirm.

First, defendant argues that the trial court erred in refusing to instruct the jury on the lesser offense of voluntary manslaughter because sufficient evidence was presented as to the element of provocation.

Voluntary manslaughter is a cognate lesser offense of first-degree murder. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). If the evidence presented cannot support a conviction under the cognate offense, then the trial court should not give the instruction. *Id.*

The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. *Id.*, 389. The provocation must be adequate to cause the reasonable person to lose control. *Id.* When as a matter of law, no reasonable jury could find that the provocation was adequate, the trial court need not instruct on voluntary manslaughter. *Id.*, 390, 392.

In *Pouncey*, the defendant requested a jury instruction on voluntary manslaughter when he had engaged in a fight after being verbally insulted. *Id.*, 387. The Court held that insulting words were not adequate provocation to justify voluntary manslaughter and the trial court did not err in refusing to instruct on voluntary manslaughter. *Id.*, 392.

In this case, the provocation was even less significant than insulting words. Defendant simply claimed that the decedents told him that they were unable to pay him money he was due, in an amount less than $10, for yard work he had done. Consequently, the trial court did nor err in finding as a matter of law that decedents' refusal to pay a nominal debt was not adequate provocation to justify an instruction on voluntary manslaughter. Furthermore, any error was harmless because the jury convicted defendant of first-degree felony murder even when given the option to convict on an intermediate offense between murder and voluntary manslaughter. *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992).

Second, defendant argues that the trial court erred in refusing to instruct the jury on the defense of accident because sufficient evidence was presented to warrant an instruction.

A trial court is required to give a requested instruction on a defense theory, except where the theory is not supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995).

There are two standard jury instructions dealing with the defense of accident to a charge of murder: (1) "involuntary acts," CJI2d 7.1, and (2) "not knowing consequences of act," CJI2d 7.2. The "involuntary acts" instruction deals with situations such as a gun accidentally discharging, *People v Owens*, 108 Mich App 600, 608-609; 310 NW2d 819 (1981), and is not applicable in this case.

The "not knowing consequences of act" instruction is to be used when the defendant acknowledges that the act is voluntary but the consequences were unintended. CJI2d 7.2. This "means that [he/she] did not mean to kill or did not realize that what [he/she] did would probably cause a death or cause great bodily harm." CJI2d 7.2.

In this case, defendant claims that evidence was presented that he did not intend to harm or kill the decedents and that because of mental deficiencies he was unable to understand the consequences of his actions. However, this jury instruction does not address mental impairment and its relation to a defendant's inability to understand his actions. Nor does defendant cite any case law in which this jury instruction is used in that way. Regardless, it is unreasonable for defendant to claim that he did not realize that beating decedents severely would cause great bodily harm given that a psychologist and a psychiatrist testified that defendant had normal intelligence and only some mild emotional and mental impairments with a history of drug abuse. Consequently, the trial court did not err in refusing to give an instruction on accident as a defense.

Last, defendant argues that even absent his request for a jury instruction on the defense of claim of right to the underlying felony charge of larceny, the trial court erred because it failed to instruct the jury on this defense. "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. Consequently, defendant failed to preserve this issue for appeal.

Affirmed.

/s/ Hilda R. Gage
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald